United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1930

To be argued by
Roy L. Reardon

74-1930

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

SERGIO POBLETE

Defendant-Appellant

DEFENDANT-APPELLANT'S REPLY

ROY L. REARDON
Attorney for Defendant-Appellant,
Sergio Poblete
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

MARTHA S. MYERS

Of Counsel

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REPLY BRIEF OF DEFENDANT-APPELLANT

ARGUMENT

APPELLANT'S PLEA OF GUILTY DID NOT WAIVE HIS RIGHT TO CHALLENGE THE JURISDICTION OF THE COURT UNDER UNITED STATES v. TOSCANINO

The decision in United States v. Toscanino, 500 F.2d 267 (2d Cir.), rehearing denied 504 F.2d 1380 (1974), held that a court must

> ". . .divest itself of jurisdiction over the person of the defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." 500 F.2d at 275.

In so holding, this Court rejected the Ker-Frisbie rule that:

"the power of a court . . . is not impaired by the fact that he

had been brought within the court's jurisdiction by reason of a 'forcible abduction'." Frisbie v. Collins, 342 U.S. 522 (1954). Toscanino deprives the court of such power, holding that due process principles deny the court jurisdiction barring the government from obtaining a conviction.

The appellant-defendant Sergio Poblete ("Poblete") testified that he had been arrested in Chile and brought to the United States for trial in a manner so shocking that, if undenied, would deprive the court of jurisdiction over Poblete under United States v. Toscanino, 500 F.2d 267 (2d Cir.), rehearing denied, 504 F.2d 1380 (1974). The allegations of Poblete were sufficient to mandate a hearing. Once a hearing is granted, the government must "respond" to the allegations of misconduct. 500 F.2d at 268.

The argument of the United States ("appellee") fails to address the principal issue before this court on this appeal -- whether an unsworn statement of an Assistant United States Attorney is sufficiently competent to meet the government's burden of proving that the defendant Poblete was not before the court in violation of his Fourth Amendment rights. As we establish in our brief, questions of violations of constitutional rights as defined by Toscanino mandate a hearing at which the government must meet its burden of proof through the testimony of competent witnesses. Unless the government is required to meet this

burden, the rights enunciated by Toscanino will be rendered meaningless.

Gerstein v. Pugh, 43 U.S.L.W. 4230 (1975), does not affect this Court's ruling in Toscanino. Gerstein ruled that a person arrested by prosecutor's information "is constitutionally entitled to a judicial hearing of probable cause for pretrial restraint." 43 U.S.L.W. at 4231. It is in this context that Ker-Frisbie was affirmed and not the context of the shocking and outrageous conduct of Toscanino.

It is noteworthy that Gerstein holds:

> "that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint on liberty pending trial . . . ."
> 43 U.S.L.W. at 4231 (emphasis added).

The unsworn testimony of the Assistant United States Attorney is no more sufficient to establish that jurisdiction has been constitutionally obtained.

The appellee's principal argument is that Poblete waived his right to attack the jurisdiction of the court, on the basis of Toscanino, by his plea of guilty. United States v. Doyle, 348 F.2d 715 (2d Cir. 1965), cert. denied, 382 U.S. 843 (1965), cited by the appellee, holds that by a guilty plea a defendant does not waive consideration by an appellate court of such fundamental premises of the conviction as jurisdiction.

Rule 12(b)(2) of the Federal Rules of Criminal Procedure allows a challenge to jurisdiction to be raised at any time. The pre-Toscanino cases cited by the appellee limit the Rule to subject matter jurisdiction since:

> ". . .it has long been a firmly entrenched principle of federal jurisprudence that if the accused is personally before a court having jurisdiction of the subject matter, the court has jurisdiction. . .regardless of how he was brought into the presence of the court." Bristam v. United States, 253 F.2d 610 at 612 (8th Cir. 1958).

This conclusion can only be supported by giving effect to the Ker-Frisbie rule that due process does not extend to the manner in which a defendant is brought to court. Toscanino rejected Ker-Frisbie to deny the government the power to convict by requiring a court to divest itself of jurisdiction.

The unconstitutionally obtained presence of the defendant is one of the "fundamental premises of jurisdiction" of Doyle not waived by the plea of guilty or under the cases developing from United States v. Brady, 397 U.S. 742 (1970), relied on by the brief for the appellee. The cases cited by the appellee in its brief as establishing a waiver of a claim based on the existence of personal jurisdiction are conditioned on the principle of Ker-Frisbie. Toscanino, insofar as it rejects Ker-Frisbie, impliedly rejects those cases which hold that a claim that personal

jurisdiction had been unconstitutionally obtained is waived by a guilty plea.

In United States v. Brady the Supreme Court announced a general rule that a guilty plea, if voluntarily and intelligently made bars later assertions of constitutional challenges to pretrial proceedings.* This waiver, however, is not absolute. In Blackledge v. Perry, 417 U.S. 21 (1974), the Supreme Court, distinguishing Tollett v. Henderson, 411 U.S. 258 (1973),** narrowed the Brady rule holding that it does not apply where the right asserted goes to "the power of the government to bring the defendant into court to answer the charges brought against him." Blackledge, 417 U.S. at 30. Thus, in Blackledge

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* In United States v. Brady and in Parker v. North Carolina, 397 U.S. 759 (1970), defendants challenged their conviction following a plea of guilty, on the basis of an unconstitutional death penalty statute. In McMann v. Richardson, 397 U.S. 790 (1970), the challenge was to the voluntariness of a confession. In each case, a waiver by the plea was found.

** Tollett held that constitutional claims of discriminatory selection of the grand jury were waived by a guilty plea. Blackledge distinguished Tollett as being curable by the calling of a new grand jury. In none of the Brady decisions relied on by appellee was the jurisdiction of the court and its power to convict in question. Where the right claimed denies such jurisdiction, Brady may not be used to prevent its assertion.

the defendant was not barred from asserting a claim of double jeopardy where he had entered a guilty plea in a felony proceeding after conviction for a misdemeanor. Since the state could not require the defendant to answer the felony charge, the court held that he could not be foreclosed by reason of his guilty plea from attacking his felony conviction. The violation of a defendant's rights recognized by Toscanino similarly denies the government such power. If the court could not exercise jurisdiction over Poblete to obtain a conviction, Poblete cannot be foreclosed from challenging that conviction on this appeal.

The "fruit" of the shocking and outrageous conduct alleged by Poblete is his unconstitutionally obtained presence before the court. Such conduct, unless contradicted by competent testimony on behalf of the United States, deprives the government of power to obtain a conviction by denying the court jurisdiction. Poblete's plea of guilty was not a waiver of his right to challenge the jurisdiction of the court.

CONCLUSION

THE JURISDICTIONAL FINDING OF THE COURT WAS CLEARLY ERRONEOUS AND SHOULD BE REVERSED AND THE INDICTMENT AND INFORMATION AGAINST DEFENDANT-APPELLANT POBLETE SHOULD BE DISMISSED.

Respectfully submitted,

Roy L. Reardon
Attorney for Defendant-
Appellant Sergio Poblete
Office and P.O. Address
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

MARTHA S. MYERS,
Of Counsel.